

negotiated, then renegotiated once every five years. Ratings contracts are negotiated once every seven years. National advertising rep contracts are negotiated once every five years, and to the extent David is involved (he testified that he can step out of this process totally), it is only in the "final deal" and the "economics" of that deal.

162. As to strategic planning for the company, such as new acquisitions, David Smith noted that "there aren't a lot of television stations out there for sale." In any event, strategic planning is a fluid process; it is not a desk job that requires either an allocation of time or physical presence at a particular location. In short, David, Robert and Frederick Smith can handle strategic planning for Sinclair just as easily in roles as full-time station managers as they can without those roles.

163. With respect to the Smiths' non-Sinclair television stations in Indianapolis, Indiana and St. Petersburg, Florida, these are small operations which are also operated day-to-day by on-site General Managers. The fourth Smith brother, Duncan, is primarily responsible for oversight of these stations. The greatest involvement by either David, Robert or Frederick in these stations is a once-a-year on-site visit by Frederick to the St. Petersburg station -- comprising all of 16 hours including transportation. Robert Smith speaks to the general managers usually once a week by phone; David's involvement in these properties is virtually non-existent.

164. Finally, it is clear from the record that the handful of "S-corporations" in which the Smiths have interests are passive companies -- "collection points" for checks -- that

occupy, at best, a minuscule amount of the brothers' time. Primarily, they are corporate entities formed to hold real estate, equipment, and various other hard assets associated with Sinclair's television stations, and, while a contract or lease is negotiated on occasion, David, Robert and Frederick Smith play virtually no role in maintaining the assets or administering the contracts -- they simply collect income. Even the "busiest" of these companies, Cunningham Communications, occupies no more than a couple hours of the brothers' time a month.

165. The fact is that David, Robert and Frederick Smith lead enviable lives. They are owners and executives of a holding company under which a number of television stations are operated autonomously, by skilled and able on-site managers and staff. Other competent personnel are delegated the task of managing the day-to-day financial operations of the holding company itself.

166. As a result, David, Robert and Frederick Smith are extremely free and flexible with respect to putting time in "at the office." None of them has set working hours; they can work at the office as much or as little as they see fit. Indeed, Frederick Smith has recently cut back his time at the office to 2 and 1/2 hours a week. For the most part, the brothers spend their days reading the trade press. They take phone calls. They contemplate decisions regarding the growth of the company. They wander the halls of the building, talking with WBFF(TV) personnel. In short, the record overwhelmingly reflects a simple fact: that Sinclair and the Smith brothers' other businesses operate such that they require little of David, Robert and Frederick Smiths' time on a day-to-day basis.

167. All of this may be astounding, even worthy of envy, to an ordinary observer. That, however, is no reason to discount the consistent and pervasive testimony of David, Robert and Frederick Smith throughout the record, establishing that Four Jacks' three integrated principals have always been committed and are fully able to carry out their pledges to work at Four Jacks' proposed Baltimore television station on a full-time basis while still retaining their positions as owners and executives of Sinclair Broadcast Group, Inc. See Valley Broadcasting Co., 4 FCC Rcd at 2614 ("mere disbelief" insufficient to find misrepresentation or lack of candor). In light of this evidence, and the total absence of any evidence to the contrary, it must be concluded that David, Robert and Frederick Smith simply had no motive to deceive the Commission into believing they would give up their Sinclair positions.

2. **David, Robert and Frederick Smith Intend to Carry Out Their Respective Managerial Positions on a Full-Time Basis**

168. In paragraphs 11 and 17 of his Memorandum Opinion and Order denying summary decision on the issue against Four Jacks, FCC 94M-246 (released April 11, 1994), the Presiding Judge expressed a secondary concern that, rather than David, Robert and Frederick Smith carrying out their specific proposed managerial positions on a full-time basis, Four Jacks' proposed station would be managed by the same consensus-based, "four men in a room" "management committee" approach under which the four Smith brothers oversee Sinclair's existing television stations. The Judge was concerned that David, Robert and Frederick Smith had

"conceal[ed] a contrary true intent" to manage Channel 2 by this method rather than being involved in specific managerial roles.

169. At the hearing, Scripps Howard's questioning of Four Jacks' witnesses seemed designed to confuse the principals rather than to ascertain the truth on this point. Throughout the muddled cross-examination, however, David, Robert and Frederick Smith drew a clear distinction between the "executive committee" or "management committee" approach that the Smith brothers use to oversee Sinclair's operations, and the "management committee" that is contemplated for the proposed Channel 2 station.

170. On one hand, the "executive" or "management" committee of the Smith brothers that reviews the operations of Sinclair's stations is one of consensus. The four Smith brothers sit in a room and discuss issues pertaining to Sinclair's stations, with each brother having an equal say.

171. Despite cross-examining counsel's repeated obfuscation of the issue, Four Jacks' witnesses took pains to distinguish this approach -- which they utilize as executives of the Sinclair holding company -- with the "management committee" approach that is employed at each of Sinclair's individual stations, and which they contemplate using at the Channel 2 station as well. This "management committee," unlike the committee of Sinclair executives, will be a committee of department heads -- with David, Robert and Frederick Smith included in that committee in their respective roles as General Manager, Station Manager, and Operations Manager. Unlike the consensus approach used by the executive committee of Sinclair, the General Manager will have the final say in disputes among the Channel 2 management

committee -- just as is the case with Sinclair's individual stations, or for that matter, any other television station in this country.

172. The salient factual point is that David, Robert and Frederick Smith have always intended to work a minimum of 40 hours per week at Four Jacks' proposed Channel 2 station carrying out their proposed roles as General Manager, Station Manager, and Operations Manager. The "management committee" proposed for Four Jacks' station is entirely consistent with these roles, and there is no evidence in the record to suggest that David, Robert and Frederick Smith will not fulfill their specific managerial roles. Thus, it cannot be concluded that the three principals have somehow concealed a "contrary true intent" not to work in their specific managerial roles, since no such intent has ever existed.

**3. The Record Does Not Support a Finding
that David, Robert and Frederick Smith
Intentionally Misrepresented Facts or
Lacked Candor With Respect to
Their Integration Commitments**

173. It is hornbook law that a finding of misrepresentation or lack of candor requires evidence of an intent to deceive. See Weyburn Broadcasting Limited Partnership v. FCC, 984 F.2d 1220, 1232 ("intent to deceive [is] an essential element of a misrepresentation or lack of candor showing"). Thus, the Commission has held that "[a] necessary element in misrepresentation is willfulness." F.B.C. Inc., 3 FCC Rcd 4595, 4597 (M.M. Bur. 1988) (citing Bluegrass Broadcasting Co., 43 F.C.C.2d 990, 993 (1973)). As the Review Board noted in Tequesta Television, Inc., 2 FCC Rcd 7324, 7325 (Rev. Bd. 1987), "an

intent to deceive, which lies at the core of all misrepresentation-like issues, must be proven."

174. Four Jacks cannot be disqualified under the issue against it because (i) the record does not support a finding that David, Robert and Frederick Smith, at the time of making the resignation commitments in question, intended to give up their positions with Sinclair; and (ii) the record does not support a finding that David, Robert and Frederick Smith intended their use of the phrase "then-current" employment to encompass their positions as owners and executive officers of Sinclair.

(a) **David, Robert and Frederick Smith
Never Intended to Give Up Their
Sinclair Positions**

175. As discussed in detail above, David, Robert and Frederick Smith have the time, and are fully committed, to carrying out their proposed managerial positions at Four Jacks' station on a full-time basis while still serving as owners and executive officers of Sinclair. They therefore had no motive to somehow deceive the Commission into thinking they would give up their Sinclair positions.

176. Thus, it is hardly surprising that the record is devoid of any evidence indicating that David, Robert and Frederick Smith intended to resign their executive and ownership positions with Sinclair. In their direct testimony and on cross-examination, David, Robert and Frederick Smith made clear that it has never been their intention to give up their positions as executives and owners of Sinclair. That evidence is unrebutted and dispositive.

177. Indeed, the notion that David, Robert and Frederick Smith ever intended to give up their Sinclair positions is utterly inconsistent both with logic and with other elements of Four Jacks' Channel 2 proposal. First, one well-known Commission requirement -- at least at the time the statements in question were made -- was that where an applicant is involved with other businesses, and wishes to prove to the Commission that he will give up such involvement in order to garner integration credit, the applicant must specifically state his intention to give up involvement with his other businesses. See Coastal Broadcasting Partners, 7 FCC Rcd 1432, 1435 (1992). Indeed, there is an abundance of comparative decisions denying integration credit to applicants that claimed they would give up their involvement in other businesses, but never specifically stated that intention. See, e.g., Gloria Bell Byrd, 7 FCC Rcd 7976 (Rev. Bd. 1992) (integration credit denied where applicant did not unequivocally commit to divesting ownership and executive positions with another business), rev. denied, 8 FCC Rcd 7124 (1993); HS Communications, Inc., 7 FCC Rcd 6448 (Rev. Bd. 1992) (where applicant did not timely propose to divest or limit role as president of cellular company, integration credit denied despite applicant's post-hearing claim that he would not be involved in company), rev. denied in pertinent part, 8 FCC Rcd 3237 (1993); Emision de Radio Balmaseda, Inc., 7 FCC Rcd 3852 (Rev. Bd. 1992) (integration credit denied in absence of timely and specific pledge by applicant to terminate ownership of and full-time involvement in other business), rev. denied, 8 FCC Rcd 4335 (1993).

178. Accordingly, had David, Robert and Frederick Smith intended to give up their executive and ownership positions with Sinclair, they would have so stated in their application instead of stating that they were proposing to divest only WBFF(TV). Indeed, proposing to resign their Sinclair positions would have worked to Four Jacks' advantage, in that Four Jacks would have been more likely to have garnered full integration credit without any detailed inquiry into the ability of its integrated principals to accommodate their full-time integration pledges and their other business activities. The fact that David, Robert and Frederick Smith did not state that they would resign their Sinclair positions leads to only one conclusion: that they never intended to do so.^{22/}

179. Moreover, it is an uncontested fact that the principals of Four Jacks have proposed only to divest WBFF(TV) in Baltimore in the event Four Jacks' application is granted. Four Jacks acknowledges that there is a difference between a diversification pledge and an integration pledge. Yet it simply would have been illogical for David, Robert and Frederick Smith to on one hand propose to divest only one of Sinclair's television stations,

^{22/} In this regard, it would be plain error for the Judge to hold as a matter of law that David, Robert and Frederick Smith were specifically required to state that they would keep their ownership and executive positions with Sinclair. No such requirement exists anywhere in Commission decisions; all that is required is that an applicant specifically state what involvement in other businesses he will give up or limit in order to fulfill his integration pledge. In any event, as discussed below, the paragraphs of David, Robert and Frederick Smiths' November 1993 direct case testimony in which they discuss their ability to fulfill their integration proposals "notwithstanding SBG's other media interests" clearly established that they intended to retain their positions with Sinclair.

while on the other hand pledging to give up their involvement in Sinclair as a whole. Had David, Robert and Frederick Smith intended to give up their ownership and executive positions with Sinclair, it would have been logical and far easier -- and far more advantageous to Four Jacks' comparative position -- for the brothers to propose to divest all of the Sinclair stations.

180. The record is clear, however, that David, Robert and Frederick Smith intended to do only that which was necessary to avoid being legally barred from obtaining a license for Channel 2 -- i.e., divest WBFF(TV) in Baltimore, since the Commission's multiple ownership rules required it. They knew from the HDO that all they had to do if they won was divest that station. On the other hand, David, Robert and Frederick Smith understood that retaining their positions with Sinclair would not be a bar to a grant of Four Jacks' application. On these facts, the only conclusion that can be drawn from Four Jacks' limited divestiture pledge is that David, Robert and Frederick Smith intended to retain their executive and ownership positions in the Sinclair company.

181. Finally, and compellingly, is the fact that, in their original direct case testimony, each of the three made it a point of explaining how their Sinclair positions would be accommodated with their pledges to manage Four Jacks' proposed Channel 2 station on a full-time basis:

I am presently an officer, director and shareholder of Sinclair Broadcast Group, Inc. ("SBG"), which through various subsidiaries owns the media interests set forth in Four Jacks Exhibit 1. As set forth herein, I have proposed to divest all of my interests in and

sever all connections with WBFF(TV), Baltimore, Maryland, should Four Jacks' application for Channel 2 at Baltimore be granted. Each of the other stations owned (or to be acquired) by SBG has a professional General Manager who is fully responsible for each station's day-to-day operations. Moreover, SBG has a full-time Comptroller who handles SBG's financial and business operations on a daily basis. Thus, notwithstanding SBG's other media interests, I am able and committed to carrying out my pledge to manage, on a full-time basis, a VHF television station in Baltimore, Maryland, the community where I was born and have lived virtually all my life.

(Four Jacks Ex. 2 at 1-2; Four Jacks Ex. 3 at 1-2; Four Jacks Ex. 4 at 1-2 (emphasis added)).

182. Thus, in the above paragraph, David, Robert and Frederick Smith begin by acknowledging that they are officers, directors and shareholders of Sinclair, and that Sinclair owns a number of media interests. After noting their pledge to divest themselves only of WBFF(TV) in Baltimore, the brothers proceed to explain that each of the other stations owned by Sinclair has its own General Manager and that Sinclair has a full-time Comptroller -- and, therefore, "notwithstanding [Sinclair's] other media interests," the brothers are able and committed to carrying out their integration pledges.

183. It is impossible to reconcile these statements with the notion that David, Robert and Frederick Smith somehow intended to resign their positions with Sinclair. Had David, Robert and Frederick Smith so intended, it would have been totally unnecessary for them to explain that, because there are individual general managers and a company Comptroller who run Sinclair's stations on a full-time basis, they are "able and

committed" to fulfilling their integration commitments "notwithstanding SBG's other media interests." While the Presiding Judge speculated in his MO&Q as to the existence of a "trust arrangement or some equally effective remedy that would functionally equate with 'resigning' from positions and responsibilities of employment with Sinclair," the unrebutted testimony of David, Robert and Frederick Smith establishes that no such mechanism exists. (Four Jacks Ex. 26 at 4; Four Jacks Ex. 27 at 4; Four Jacks Ex. 28 at 4). There is nothing else in the record to support such speculation. The existence of the above-quoted testimony simply destroys the basis for any conclusion that David, Robert and Frederick Smith intended to resign their Sinclair positions.

**(b) David, Robert and Frederick Smith Did
Not Intend Their Pledges to Resign
Their "Then-Current Employment" to
Encompass Their Positions as Owners
and Executives of Sinclair**

184. As discussed above, the record shows that (i) David, Robert and Frederick Smith always have been both willing and able to fulfill their full-time Channel 2 integration pledges while continuing to serve as owners and executive officers of Sinclair; and accordingly, (ii) never intended to resign their ownership and executive positions with Sinclair. It virtually automatically follows, therefore, that David, Robert and Frederick Smith did not intend their pledges to resign their "then-current" employment to encompass their Sinclair ownership and executive positions.

185. Lacking any evidence of either a motive or an intent to deceive on the part of David, Robert and Frederick Smith with respect to their integration pledges, it is not surprising that Scripps Howard has done everything in its power to obscure the proper context of the issue against Four Jacks by devoting virtually all of its efforts to what Frederick Smith aptly characterized as an issue of "semantics"^{23/} -- i.e., attempting to prove that David, Robert and Frederick Smith are in fact "employees" of Sinclair and thus must have falsely stated to the Commission that they would resign their positions at that company, regardless of whether they had any reason or intention to do so.

186. Over Four Jacks' objections, Scripps Howard was allowed to parade into the record a number of Sinclair business documents that indicate that David, Robert and Frederick Smith, for certain tax reporting and other administrative purposes, are considered "employees" of the company. For instance, Sinclair has W-2 and W-4 tax forms for David, Robert and Frederick Smith which contain in the form the word "employee." David, Robert and Frederick Smith choose to receive compensation from Sinclair under the same corporate payroll system that administers payments to the company's employees. David, Robert and Frederick Smith are enrolled in Sinclair benefit plans, such as 401(k) and health insurance, that by the terms of their summary plan descriptions are offered to "employees" of the company.

23/ Tr. 2141-43.

187. Four Jacks has stipulated to these basic facts and to the authenticity of the documents Scripps Howard placed in the record. The reason is that these documents, as a matter of both fact and law, are incompetent to support a disqualification of Four Jacks under the designated issue because they go nowhere toward proving the intent to deceive necessary for such a result.

188. The United States Court of Appeals for the District of Columbia Circuit's decision in RKO General, Inc. v. FCC, 670 F.2d 215 (D.C. Cir. 1981), cert. denied, 456 U.S. 927 (1982), stands for this proposition. In that case, the Commission disqualified RKO for filing false financial reports with the Commission. The basis for the Commission's ruling was a Special Report prepared by RKO and submitted to the SEC, in which RKO admitted that the corporate records for these financial reports were inaccurate. Based on this document, the Commission found that "RKO knowingly certified to the Commission that certain financial reports were complete and accurate when RKO knew otherwise." Id. at 225.

189. On appeal, the D.C. Circuit reversed RKO's disqualification on this ground, stating:

The FCC justifies its finding on the basis of the Special Report, which included numerous corporate admissions that RKO's recordkeeping had been sloppy and inaccurate. Specifically, General Tire conceded in the Special Report that RKO's accounting for trades and barter had been incomplete for the previous five years. The FCC seized on the repeated attempts by RKO's controller to improve the recording of such information to infer that he "had to know that RKO's barter information was inaccurate" as early as 1972 This inference was unwarranted. RKO's objections to such summary fact-finding are well taken, because the admitted inaccuracy of the reports still left issues as to RKO's

motive and intent that could only have been determined in what the FCC itself has called the "crucible of an evidentiary hearing." Walton Broadcasting, Inc., 78 F.C.C.2d 857, 877 (1980). It is absurd to claim that "RKO's underlying motives were not decisionally significant, and thus any supposed factual issue as to motivation was immaterial," . . . when the issue is not whether the reports were inaccurate but whether they were knowingly so.

Id. (emphasis in original; internal citations and footnotes omitted).

190. The teaching of RKO is that documents alone, even when they indicate that facts have been stated inaccurately to the Commission, cannot serve as the basis for disqualification absent some exploration of motive and intent in supplying the inaccurate information. Thus, even assuming arguendo that the documents appended to Scripps Howard Ex. 40 prove that David, Robert and Frederick Smith are in fact "employees" of Sinclair by some objective test, they cannot provide support for a finding of misrepresentation or lack of candor absent some evidence of David, Robert and Frederick Smiths' intentions in using the language "then-current employment."

191. Even if documents alone could ever constitute probative evidence of a party's intent in making certain statements to the Commission, the documents introduced by Scripps Howard cannot do so in this case -- for the record here establishes that David, Robert and Frederick Smith had little if any knowledge of the corporate and tax documents that supposedly treat them as

"employees" of Sinclair.^{24/} For instance, the testimony shows that David, Robert and Frederick Smith had not even seen, or at a with which they minimum had not paid attention to, their W-2 and W-4 forms; those forms are dealt with by the brothers' accountants. David Smith testified that he did not make the decision to place his name on a list of "employees" submitted to the Maryland unemployment insurance agency. David, Robert and Frederick Smith were not familiar with the Internal Revenue Code's definition of corporate officers as "employees." The brothers were not familiar with the lengthy summaries of Sinclair's 401(k) plan. With the possible exception of Frederick, the same is true with respect to the summaries of Sinclair health plans; even Frederick understood that one either had to be an employee or an officer or a director to be eligible.^{25/} Quite simply, the documents which Scripps Howard has introduced to show that David, Robert and Frederick Smith are "employees" of Sinclair are for the most part documents that the three principals had not even seen, or at a minimum with which they were not familiar. These documents therefore cannot in any

^{24/} It is instructive that the "Special Report" prepared by the applicant in RKO General, supra, was a document consciously prepared by the party charged with the FCC misrepresentation -- in contrast to the business documents introduced by Scripps Howard here, of which the record reflects that David, Robert and Frederick Smith had little or no knowledge or familiarity. Even in RKO General, the court ruled that the "Special Report" could not serve as the basis for RKO's disqualification absent some evidence of RKO's intent in making inaccurate representations to the Commission.

^{25/} There is nothing abnormal in any of these facts. It is not unusual for successful owners of a business, like the Smith brothers, to delegate functions such as tax preparation or the administration of company benefit plans to others, and consequently to pay little attention to these matters.

way be probative of the brothers' intent in making the statements in question.

192. The documents' probative value is even further lessened when it is considered that many of the documents are government forms which do not leave room for a distinction between executive officers on one hand, and employees on the other. Indeed, when confronted with a Sinclair unemployment insurance filing containing their names on a list of "employees," David and Robert Smith observed that "this is the way the form is," and that they "are not left with much alternative in terms of what the form says or doesn't say." (Tr. 1814, 2073). The Judge may take official notice of the fact that there are no separate versions of W-2 or W-4 forms for executive officers of a corporation. Even with respect to language in benefit plan descriptions making such plans available to company "employees," Robert Smith was surely correct in noting that such language is "boilerplate," common to any other such plan. (Tr. 2043). These documents -- mainly routine corporate records and forms with which the three principals had next to no familiarity -- go nowhere toward establishing the necessary element of a misrepresentation/lack of candor finding: that David, Robert and Frederick Smith intended to deceive the Commission in making the precise statements in question.

193. The only evidence of David, Robert and Frederick's intent in pledging to resign their "then-current" employment is their un rebutted testimony that they did not intend to convey that they would resign their ownership and executive positions with Sinclair. (Four Jacks Ex. 26 at 3; Four Jacks Ex. 27 at 3;

Four Jacks Ex. 28 at 3). That intent is entirely consistent with the overwhelming record evidence that (i) David, Robert and Frederick Smith are fully able to carry out their full-time integrated pledges without giving up their positions as owners and executives of Sinclair; and that (ii) accordingly, they never intended to resign their Sinclair positions.

194. Moreover, even under Scripps Howard's approach of considering the "then-current employment" language in complete isolation, there is ample evidence in the record to support David, Robert and Frederick Smiths' testimony that they do not consider themselves "employees" of Sinclair in the traditional sense. Whatever might be their formal legal status according to some form or IRS definition, there can be no dispute on this record that David, Robert and Frederick Smith operate far differently than the conventional (or in their words, "true") employee. They do not have defined job descriptions. They do not have set working hours. They do not report to any supervisor. As they testified, David, Robert and Frederick Smith are officers/directors and owners of the company -- in contrast to what they consider to be traditional "employees."

195. This contrast in the minds of David, Robert and Frederick Smith even finds support in the evidence supplied by Scripps Howard. For instance, the corporate tax return material contained in Tab 1 of Scripps Howard Ex. 40 establishes that Sinclair categorizes its compensation to David, Robert and Frederick Smith as "Compensation of Officers." Similarly, Sinclair's SEC filings define compensation to these three principals as "Executive Compensation." Tabs 25 and 27 of

Scripps Howard Ex. 40 -- on which David, Robert and Frederick Smith were (unsurprisingly) never cross-examined -- authorize bonuses to these three principals as "executive officers/principals" and as "owners" of Sinclair. Clearly, there is documentary evidence supporting David, Robert and Frederick Smith's perception of themselves as something far different from "employees."

196. David, Robert and Frederick Smith testified they intended by the phrase "then-current employment" to convey that in the event any of them acquired what they considered to be "employment" in the future, they would resign it to devote full-time to managing Four Jacks' station. The examples of such employment that they cited -- e.g., working for Sumner Redstone at Viacom, working at McDonalds, flying commercial aviation -- are entirely consistent with their perceived position as executive officers and owners (rather than traditional "employees") of Sinclair, as well as with the abundant record evidence of their ability and intent, at all phases of this proceeding, to fulfill full-time management positions at Four Jacks' proposed Channel 2 station while remaining owners and executive officers of Sinclair.

197. David, Robert and Frederick Smiths' position that they are not "employees" of Sinclair may be technically right, or it may be technically wrong. Whatever the answer, it is immaterial, for it has nothing to do with the three principals' intent in stating that they would resign their "then-current employment." The un rebutted testimony of David, Robert and Frederick Smith is that this language was not intended to convey that they would

resign as owners or executive officers of Sinclair. Given that David, Robert and Frederick Smith are able to fulfill their Four Jacks integration commitments while still occupying their ownership and executive positions with Sinclair and therefore never intended to give up their Sinclair positions, and given the ample evidence that they are highly distinguishable from conventional corporate "employees," their testimony that their pledges to resign their "then-current employment" did not extend to their Sinclair positions is entirely reasonable and truthful.

**(c) Sinclair's SEC Filings Provide No
Evidence of Misrepresentation or
Lack of Candor Before the Commission**

198. Much significance has been attached to various filings made by Sinclair with the SEC from late 1993 to early 1994, and in particular, the SEC filings in December 1993 in which language was added to clarify for the benefit of investors the integration intentions of David, Robert and Frederick Smith with respect to Four Jacks: i.e., that these three principals would not resign as owners and executive officers of Sinclair, and that they could perform their current duties for the company while fulfilling their Four Jacks integration commitments.

199. These SEC filings, however, have no meaning at all unless it can be found that the integration intentions set forth in Sinclair's December 1993 SEC filings are in fact inconsistent with what David, Robert and Frederick Smith had previously pledged to the Commission. Such is not the case, for the simple reason -- as shown in detail above -- that David, Robert and

Frederick Smith never intended and never pledged to resign their Sinclair positions in the first place.

200. The additional language in the December 1993 SEC filings therefore was no more than what Four Jacks' principals testified it was: clarifying language for the benefit of investors.^{26/} There is no evidence in the record to rebut this fact. In short, Sinclair's SEC filings provide no support for a finding of misrepresentation or lack of candor on the part of Four Jacks' three integrated principals.

^{26/} Just as the language of Sinclair's December 1993 SEC filings was not inconsistent with Four Jacks' FCC filings, it also is not inconsistent with Sinclair's previous SEC filings. Sinclair's SEC filings prior to December 1993 contain language not only informing investors of the Four Jacks application, but also cautioning investors that "[m]embers of the Smith Family are free . . . to acquire additional interests in television industry enterprises" and that "[s]uch activities could present a conflict of interest with [Sinclair] in the allocation of management time and resources of executive officers." (Scripps Howard Ex. 26, p. 15; Scripps Howard Ex. 31, pp. 15-16 (emphasis added)). Thus, Sinclair's SEC filings clearly cannot be found to have lacked any indication that David, Robert and Frederick Smith would remain in their Sinclair positions.

In any event, Four Jacks is constrained to note that the adequacy of Sinclair's disclosures to the SEC is not a matter for the Presiding Judge's determination. See Character Qualifications in Broadcast Licensing, 102 F.C.C.2d 1179, 1205 (1986) (non-FCC misconduct not cognizable unless it has been adjudicated). There has not even been a charge -- let alone an adverse finding -- by the SEC regarding the adequacy of Sinclair's disclosures to investors.

V. ULTIMATE CONCLUSIONS

A. The Issues Against Scripps Howard

201. Scripps Howard must be disqualified under the issues against it, because it has failed to meet its burden of establishing that it was truthful and candid with respect to documents that are critically relevant to Scripps Howard's renewal expectancy claim.

202. The record concerning the Covington notes displays a blatant and continuous web of deceit on the part of Scripps Howard. On June 25, 1993 -- on the eve of document production, Emily Barr sent Janet Covington's 1992 notes to Scripps Howard's counsel, along with the three 1991 calendars that constituted the only contemporaneous source material for Scripps Howard's ascertainment showing. In a memo accompanying the notes, Barr stated unequivocally to counsel that the Covington's notes "were prepared specifically for this license challenge issue," and made clear that Covington did not save her original calendar.

203. Three days later, the 1991 calendars provided by Barr were produced to Four Jacks -- with no mention whatsoever, let alone any sort of privilege claim for, the Covington notes. Eighteen days after Ms. Barr's memo, Scripps Howard made its first mention of any Covington "notes." That letter did not bother to mention that the Covington notes had been prepared a year after the pertinent renewal period. Moreover, it misleadingly stated that Ms. Covington had been contacted to see if she possessed the notes -- when Ms. Barr admittedly had sent them to counsel just 18 days earlier. Two months later, Barr

added to the deceit by stating in her direct case testimony that Ms. Covington had kept the notes in her possession when she left the station in 1991. Only upon Ms. Barr's Phase I hearing testimony did it become clear that the Covington notes had been created a year after the fact, and that Ms. Barr had retained those notes for some time thereafter. Ms. Barr repeatedly testified, however, that she had ultimately discarded the notes.

204. At this point, the plot began to unravel. When Four Jacks filed a motion to enlarge issues to explore the circumstances surrounding the Covington notes, Scripps Howard's first ploy was to argue -- in flat contradiction to Ms. Barr's June 1993 memo -- that Ms. Barr's prior references to Covington's notes were actually references to her earlier calendar. That tack failed, and the Judge added the requested issues. Only then -- a mere eight days after the issues were added -- did Scripps Howard miraculously (actually, quite easily) find and produce Covington's notes. Even afterwards, the deceit continued. After initially swearing that she was looking for her June 25, 1993 memo when she "discovered" the Covington notes -- and later being apprised by a Four Jacks pleading of the damning nature of that memo -- Ms. Barr at hearing changed her story and declared that she could not remember what she was looking for when she found the notes, only to ultimately attest to the truth of her prior statement that she was looking for the June 25, 1993 memo.

205. The facts concerning the NBC correspondence follow a disturbing similar pattern. No mention of these documents occurred during document production, and when Ms. Barr first admitted on cross-examination that written 1992 correspondence

with NBC existed (moments after initially denying it), she claimed that she had not retained it. Again, once the pressure mounted to reveal the documents (through Four Jacks' efforts to subpoena them from NBC), Scripps Howard filed a pleading representing that the NBC correspondence was not in WMAR-TV's possession, that the correspondence "may or may not exist," and that "a search for the documents is likely to take some time and cause delay." Yet later that day, after the Judge nonetheless scheduled a prehearing conference to discuss Four Jacks' subpoena request, Ms. Barr suddenly "discovered" the documents in her files -- whereupon their existence was first revealed, and the documents were magically produced, the very next day. Scripps Howards' rationalization now is that its misleading pleading actually was discussing NBC's possession of the documents, not WMAR-TV's. That position is simply not supported by the evidence or the pleading itself.

206. The Commission expects far more from its licenses than the "withhold, mislead, and when all else fails, produce and dissemble" approach that the record reflects with respect to both these sets of documents. The Covington notes and NBC correspondence have one thing in common -- they show that critical documentation for Scripps Howard's renewal expectancy showing was generated a year after the fact. Scripps Howard's motive to keep this fact under wraps is obvious. The record comes nowhere close to reflecting any plausible excuses for Scripps Howard's innumerable lies and evasions concerning these documents. On this record, Scripps Howard has failed to meet its

burden of establishing its character qualifications, and it must therefore be disqualified.

B. The Issue Against Four Jacks

207. The only difficulty posed by resolution of the issue against Four Jacks is in overcoming Scripps Howard's attempts to obfuscate what the issue is really about. Once it is considered that the real issue is whether David, Robert and Frederick Smith had any plausible motive or intent to deceive the Commission as to their integration intentions -- and not some semantic battle over the definition of "employment" -- resolution of the issue in Four Jacks' favor is easy.

208. The fact is that David, Robert and Frederick Smith have never intended to give up their positions as owners and executive officers of Sinclair Broadcast Group, Inc. -- for the simple reason that they can continue to occupy those positions while serving as full-time managers of Four Jacks' proposed Channel 2 station. That being the case, they had absolutely no reason or intention to convey to the Commission that they would resign their Sinclair positions. David, Robert and Frederick Smith never specifically stated such an intention to the Commission (as they would have had to do to obtain credit for such a pledge), and they in fact took pains in their original direct case statements to explain why they could fulfill their Four Jacks integration commitments notwithstanding Sinclair's other media interests.

209. The fact that David, Robert and Frederick Smith never needed nor intended to resign their Sinclair positions is

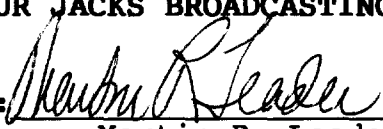
entirely consistent with their testimony that they did not consider themselves "employees" of Sinclair in the traditional sense, and therefore did not intend their pledges to resign "then-current employment" to include their ownership and executive positions with that company. This explanation is supported by abundant evidence -- both testimonial and documentary -- showing that with respect to Sinclair, David, Robert and Frederick Smith operate and are treated far differently than traditional employees.

210. The various government forms and benefit summaries in the record may or may not prove that David, Robert and Frederick Smith are technically incorrect in their perceptions of their Sinclair roles. They come nowhere close, however, to undermining the overwhelming record evidence that David, Robert and Frederick Smith had no reason, and no intention, of deceiving the Commission with respect to their integration proposals. The issue against Four Jacks must be resolved in Four Jacks' favor.

Respectfully submitted,

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